IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Regular Second Appeal No.163 of 1995.
Judgment Reserved on: 23.07.2007.
Date of decision: August 8, 2007

Joginder Singh ….**Appellant**

Versus

Prem Singh & Another ….**Respondents**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellant: **Mr.Ankush Sood, Advocate.**

For Respondent No.1: **Mr.N.K. Thakur, Advocate.**

Dev Darshan Sud,J.

This is defendant's appeal against the judgment and decree of the learned Appellate Court reversing the judgment and decree passed by the Sub Judge-(II), Una, in Civil Suit No.117/86, dismissing the suit preferred by the plaintiff for declaration to the effect that the suit land is jointly owned and possessed by the plaintiff and defendants No.1 and 2 S/Shri Mohan Singh and Pritam Singh. The plaintiff had prayed that the sale made by defendants No.1 and 2 as General Power of Attorney of plaintiff is illegal, unauthorized, null and void. In the alternative, decree for rendition of accounts was prayed for.

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***?

The plaintiff instituted the suit on the allegations that land measuring 14 Kanals 19 Marlas being 1/6th share out of the total holding of 89 Kanals 15 Marlas as described in the head note of the plaint, situated in village Udaipur in District Una, was jointly owned and possessed by the plaintiff and defendants No.1 and 2. A decree for declaration was prayed that the sale executed by defendants No.1 and 2 in favour of defendant No.3 on 10.12.1979 on the basis of a Power of Attorney having been executed by the plaintiff in favour of the defendants as aforesaid was null and void and not binding on his interests. It was also pleaded that the power to sell incorporated in the Power of Attorney was the result of fraud and mis-representation practiced by defendants 1 and 2 as the plaintiff had only given this attorney for management of the property. The plaintiff submitted that he had not received even one paisa of the sale consideration. The learned Trial Court, dismissed the suit after detailed consideration of the evidence and the Power of Attorney Ex.PW-2/A on the record, executed on 7.2.1997 by the plaintiff in favour of the defendants in the presence of two witnesses, namely; Kartar Singh and Teja Singh.

On a proper construction of the document Ex.PW-2/A, the learned Trial Court held that the power for disposal of the property was specifically included in the Power of Attorney and that the reliance placed

by the plaintiff on the ratio of the judgment in ***Mt.Jan*** *vs.* ***Mt.Fajjan and another, AIR 1938 Lahore 351,*** was not attracted to the facts of the present case. On a detailed consideration of the facts, it was held that the foundation of the case of the plaintiff was that the Power of Attorney had been obtained by mis-representation, fraud and a conspiracy as alleged and that in effect, the plaintiff sought annulment of this clause on these grounds. On a conspectus of the evidence on record, it was held that the plaintiff had not deposed on oath that the power to sell had been fraudulently inserted in the Power of Attorney as pleaded. Coupled with the fact that the assertion in the plaint was that in the General Power of Attorney the power to sell was incorporated by fraud and mis-representation and such plea not having been established by evidence or pleadings establishing as to how and in what manner the fraud/mis-representation was committed, the suit was dismissed. The learned trial Court took into the consideration the fact that in his cross-examination, the plaintiff had unequivocally admitted that he had visited Una for execution of the Power of Attorney which was registered there and whatever he had dictated had been written by the scribe. The Court noticed that the contents of the Power of Attorney had been read over to the plaintiff. In the circumstances, the plea put forth by him requesting the invalidity of the power of

sale was rejected, more especially when the foundation of fraud as laid in the plaint had not been established by him.

The Appellate Court, reversed the judgment holding that it was clear that the primary purpose of the deed was for management of the land and it is for this purpose alone that the Ex.PW-2/A had been executed.

The defendant is in appeal against this judgment. Two questions have been raised by the defendant-appellant for determination of the Court on which the appeal was admitted. The second question framed for decision is:-

> **"2. Whether the learned Distt. Judge was correct in applying the authority of the case reported as AIR 1938 Lahore page-351?**

This judgment may be noticed. In this case, the High Court of Lahore was seized of a matter where the appellant had alleged that the power of attorney had been executed by a lady only for the management of the property as she was married and was not in a position to look after the land. The learned Court on a consideration of the facts held that the power to sell and mortgage although mentioned in the document was purely incidental to the power of management and was not meant to be exercised except when it was necessary for this purpose. The Court noticed the

annotation of the law by Bowstead on Agency, stating that:

> *"Powers-of-attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction : (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts."*

The learned Court, after consideration of the law, held that the facts established did not indicate that the power to sell was entrusted/granted by the Power of Attorney or intended to be so.

This Court in ***RSA No.80 of 1989,*** titled: ***Subhash Chander and Others vs. Mansha Devi,*** was dealing with the case where the plaintiff an old, illiterate and helpless widow belonging to the Rajput tribe was unable to manage the properties in a proper manner. She had executed a General Power of Attorney in favour of one Chaman Lal, who was the collateral of her husband and who had approached to help her out with the management of the properties. Under the guise of management, the defendant-respondent in that case had disposed of the property of the plaintiff.

The Court held that the widow had honestly believed that the Power of Attorney had been given only for the purposes of management and for performance of acts ancillary to such power which did not include power of sale of the property. The trial Court, after consideration of the main evidence in detail, had dismissed the suit of the plaintiff declining a decree for possession of the suit property. The Appellate Court had reversed the judgment. In appeal by the defendant in this Court, it was held that the state of evidence was not satisfactory. There were material contradictions in the recitals of the sale deed as also oral statements of the witnesses. On a proper construction of the Power of Attorney, this Court concluded that the primary purpose was for management of the property and the power of sale was only incidental and confined to sub-serve the main purpose namely that of management. On analysis of the facts in both the cases, the Court held that the ratio of the judgment laid down in *Mt.Jan vs. Mt.Fajjan and another, AIR 1938 Lahore 351* squarely applied to the facts of this case.

In ***Syed Abdul Khader vs. Rami Reddy and others, AIR 1979 SC 553***, the Hon'ble Supreme Court had pronounced on the interpretation of a power of attorney granting power of sale. One of the questions involved for consideration was as to whether the power

of attorney had on its true construction granted the right to sell the property in question or not. It was held:-

> "***15.*** *The next contention is that upon a true construction of Ext. P-1, the authority conferred thereby was to manage the property of the donors of the power (sic) and it did not confer any authority to purchase or sell the property. Simultaneously it was stated that Ext. P-2 does not improve the position in this behalf. Both the Courts have rejected this submission and for very good and convincing reasons. A bare perusal of Ext. P-1 clearly shows that apart from the power to manage the property, a further power to purchase and sell lands was conferred on the agent. Power to purchase and sell lands has been expressly mentioned at two places in Ext. P-1. …. … … … … … … … … On the contrary the general Power of Attorney is couched in a language which confers wide authority to file suits, defend actions, engage advocates, appear in various offices, purchase and sell land and execute sale deeds and get them registered, to borrow money, to employ persons needed for carrying out affairs and to dismiss them. It is difficult to appreciate the submission that the*

authority was only to manage the property. The submission is not borne out by the contents of Ext. P-1 and P-2.

17. *The next contention is that even if the Court were to accept that the authority conferred by the Power of Attorney encompasses the authority to sell land, the power to sell land was hedged in with a pre-condition or with a pre-requisite that the land could be sold either for financing litigation or if for that purpose a loan was borrowed, to repay the loan. Sustenance is sought to be drawn for this submission from the following few lines in Ext. P-1 :". . . and purchase or sell (sic) of lands and that he is authorised to appoint any pleader or special Muktar when occasioned (sic) and to stop or to take or file any copies in any suit or to file any suit or file any written statements with his own signature to fetch any loan for our business or lands or to pay the debts from out of the income of the estate or to purchase or sell the lands and to execute the sale deeds and get.registered under his signature and to obtain money or to enter into a compromise in any suit or get it settled through arbitration or to withdraw any suit. . . etc. "in Ext. P-2 the supplemental*

Power of Attorney, it is stated that the power for sale and registration of documents was conferred on the agent. The construction suggested is not warranted by the language used in Ext. P-1. The power to purchase or sell land was not hedged in by any pre-requisite or pre-condition. Each recital constitutes a separate power, namely, (i) power to purchase or sell land, (ii) power to appoint a pleader or Mukhtar, (iii) power to file suit or appear and file written statement, (iv) power to borrow money or to enter into any compromise in any suit or get it settled through arbitration and withdraw any suit. Each was an independent power. There is nothing in Ext. P-1 which would even remotely indicate that the land could be sold only for financing the litigation or if for that purpose a loan was borrowed, to repay the loan. Such power of wide amplitude conferring such wide authority cannot by construction be narrowed down to deny an authority which the donors expressly granted. The ordinary authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere but the document will be

> *considered as a whole for interpretation of particular words or directions. The contention, therefore, must be negatived".*

At this stage, the pleadings of the parties may be considered. It is undisputed that the parties to the lis are brothers i.e. the plaintiff and respondents No.1 and 2. The plaintiff alleges that he is looking after the land situated in Punjab while defendants No.1 and 2 were looking after the land in Udaipur in Himachal Pradesh and that is the reason a power of attorney was given to him to manage the land. It is averred that the plaintiff-respondent never delegated any power of sale to defendants No.1 and 2. More important, in para 4(i), the plaintiff alleges that, "the power of sale, mortgage, exchange or transfer was never intended to be given and has been fraudulently inserted in the said deed of attorney by defendants No.1 and 2 in conspiracy with the scribe and the attesting witnesses. Plaintiff never intended or authorised to defendants No.1 and 2 to transfer the property of the plaintiff. The power to sell etc. is result of fraud or mis-representation and thus in-effective, null and void. The defendants No.1 and 2, thus, have no authority to sell the land of the plaintiff".

Para-(iii) further alleges:-

> *"… … … … … If really the plaintiff wanted to sell the land in question he*

> *should have himself executed the sale and received the sale-consideration himself. The sale in question is fraudulent made in order to deprive the plaintiff of his valuable property by the defendant Nos.1 and 2 to usurp the land in suit and the devour the sale consideration. The property sold was of value about Rs.5000/- Per Kanal and sale has been executed malafide and dis-honestly for an inadequate obsensible consideration of Rs.25000/- to harm to the plaintiff. The plaintiff was never paid a single penny out of the sale proceed".*

The evidence of the plaintiff may be considered in order to test his plea as to whether any fraud had been exercised on him. He states in cross-examination, *"Yeh theek hai ki maine 1977 men pritibadi nos. 1 aur 2 ko apna Mukhtiyarnama diya tha. Yeh Una mein aakar banaya tha aur registered bhi yahin karbaya tha. Theek hai ki Arjinavis ko jo maine likhaya tha vahi likha tha. Padhkar sunaya tha aur maine angutha lagaya tha … … … … …"*

Only the plaintiff has appeared as his own witness and has not led any other evidence nor has he brought on record any fact to suggest that the purported interpolation inserting grant of power of sale has been made in the power of attorney or the power of sale has been incorporated by fraud as alleged.

DW-2 Subhash Chand, Petitioner Writer, has also stated that the power of attorney was written according to the instructions on the asking of the plaintiff and it was read over and explained to him. In these circumstances, it becomes difficult to accept that the plaintiff had in any manner been duped or the General Power of Attorney been got executed by him in the circumstances as alleged. One fact which needs to be noticed is that the power of attorney is registered as required by law since it confers a power to transfer immovable property.

Having failed to establish by clear and cogent evidence that the power of attorney was the result of fraud as alleged or that there has been an interpolation by inclusion of words granting power to the defendants-appellants to sell the property has not been established on the record of the case.

The evidence on this point is totally lacking. The plaintiff having failed to prove the basic foundation of his plea raised in the suit, cannot turn around and urge facts based on no evidence at all. It is strange that the plaintiff did not produce any of the witnesses to Ex.PW-2/A to establish his claim that power of sale was neither conferred nor intended to be conferred as such.

In these circumstances it becomes difficult to accept the contentions of the plaintiff that any fraud had been practiced on him. The facts in the

case of ***Mt.Jan*** *vs.* ***Mt.Fajjan and another, AIR 1938 Lahore 351*** and ***RSA No.80 of 1989, Subhash Chander and Others vs. Mansha Devi*** are distinguishable and the judgments are not attracted to the facts of the present case. The decision of the Hon'ble Supreme Court is applicable to the facts of the present case and a specific power of sale having been granted to the plaintiff who has been unable to establish his case of fraud as pleaded, the question is answered in favour of the appellant and against the respondent.

On the other question of law, as to whether relief of possession can be granted when no such prayer has been made, surely, the learned Appellate Court should have been alive to the situation that such a decree could not be granted unless prayed for, foundation laid for the grant of such relief, and appropriate court fee affixed. None of these facts which formed the foundation of relief had been pleaded or proved by the plaintiff. In these circumstances, this question is also answered in favour of the appellant-plaintiff.

The appeal is, accordingly, accepted. There shall be no order as to costs.

August 8, 2007. **(Dev Darshan Sud)**
(aks) **Judge.**